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No. 03-390

In The
Supreme Court of the United States

IOWA CONFERENCE OF THE UNITED METHODIST CHURCH, THE UNITED METHODIST CHURCH OF SHELL ROCK, IOWA, JERROLD W. SWINTON, RICK KROMMINGA, KAREN WAHL, KAY J. LAHR, AND KAREN L. PETERSON,

Petitioners,

vs.

JANE KLIEBENSTEIN AND GLEN KLIEBENSTEIN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Iowa

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*; AND BRIEF *AMICI CURIAE* OF PROFESSOR CARL H. ESBECK, PROFESSOR DOUGLAS LAYCOCK, AND THE JUSTICE FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

Petitioners Iowa Conference of the United Methodist Church, The United Methodist Church of Shell Rock, Iowa, Jerrold W. Swinton, Rick Kromminga, Karen Wahl, Kay J. Lahr, and Karen L. Peterson have consented to the filing of this brief by *Amici curiae* Professor Carl Esbeck, Professor Douglas Laycock, and the Justice Foundation. Because Respondents Jane and Glen Kliebenstein have withheld consent, *Amici curiae* hereby move, pursuant to Supreme Court Rule 37.2(b), for leave to file their brief in support of Petitioner.

Professor Esbeck has taught law at the University of Missouri-Columbia since 1981 and has demonstrated a longstanding interest in First Amendment and church autonomy issues. He has published several articles regarding church autonomy and has testified before the Senate Committee on the Judiciary as the Senior Counsel to the Deputy Attorney General.

Professor Laycock has taught law at The University of Texas since 1981 and at The University of Chicago before that. He has appeared in this Court on behalf of parties and amici, sometimes supporting the claims of religious organizations and sometimes opposing them, depending on the facts and an independent assessment of constitutional principles. He has published widely on religious liberty issues in general and on the right to church autonomy in particular.

The Justice Foundation seeks to mobilize citizens and provide, through financial and service contributions, free legal representation in landmark cases, to promote limited

government, free markets, private property, and parental rights.

Professor Esbeck, Professor Laycock, and the Justice Foundation remain interested in landmark cases that define, interpret, or alter the present state of church autonomy law and First Amendment provisions for the freedom of self-governance of ecclesiastical bodies. This case presents such an issue.

Although *Amici curiae* inquired as to the reason Respondents denied permission to file this Brief, no reason was provided. (Correspondence regarding *Amici curiae* requests for consent have been filed in the office of the Clerk.) Petitioners have no financial interest in the Justice Foundation and are not related in any way to Professors Esbeck or Laycock. *Amici curiae* have their own unique and independent interests in the outcome of this case, particularly the application of the church autonomy doctrine in the context of civil slander accusations.

Amici curiae frequently examine First Amendment developments regarding church law and make presentations to the next generation of lawyers regarding these issues. Their background and experience in areas such as church-state relations and First Amendment protections are highly germane to the case before the Court. *Amici curiae* submit this brief to illustrate the diversity of opinions evident in the law and to discuss the policy ramifications of allowing the law to remain in a state of confusion. Certiorari review is needed to correct this confusion among the states and correct the erroneous view of the Iowa Supreme Court. Given the ramifications of this

case on church governance, *Amici curiae* request leave to file the attached brief in support of Petitioner.

Respectfully submitted by,

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QUESTION PRESENTED

In a defamation action arising out of a church disciplinary proceeding initiated by denominational authorities against a lay officer and member of the local Methodist church, does the First Amendment permit a jury to be instructed to determine the truth or falsity of the statement that plaintiff was causing division in the local church by acting in the "spirit of Satan"?

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INTERESTS OF *AMICI* AND AUTHORITY TO FILE[1]

1. Your *Amicus*, Carl H. Esbeck, has been a law school professor since 1981, is the *Isabelle Wade & Paul C. Lyda* Professor of Law, University of Missouri-Columbia since 1991, and is the *R. B. Price* Professor of Law, University of Missouri-Columbia since earlier this year. He has a longstanding interest in the First Amendment and church autonomy, and has published several articles which concern the law of church autonomy. The three most recent articles which bear on the law of church autonomy are: *The Establishment Clause as a Structural Restraint: Validation and Ramifications*, 18 J. OF LAW & POLITICS (UVA) 445 (2002); *Differentiating the Free Exercise and Establishment Clauses*, 42 J. OF CHURCH & ST. 311 (2000); *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998).

2. Your *Amicus*, Douglas Laycock, holds the Alice McKean Young Regents Chair in Law at The University of Texas at Austin. He has served on the law faculties at Texas and at The University of Chicago since 1976. He has filed numerous briefs in this Court from a position of relative neutrality in the culture wars, sometimes supporting religious organizations and sometimes opposing them. He has published widely on religious liberty issues, including the first article that clearly distinguished church

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[1] Amici and their counsel drafted and funded this brief themselves. No other person drafted any part of the brief or made any financial contribution to its preparation or submission. Professors Esbeck and Laycock join this brief in their personal capacity as scholars, and of course neither the University of Missouri nor The University of Texas takes any position on the issues in this case.

autonomy claims from conscientious objection claims and clearly labeled each. *Towards a General Theory of the Religion Clauses: The Case of Church-Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

3. Your *Amicus*, The Justice Foundation, is a 501(c)(3) non-profit organization which provides free legal representation in landmark cases involving limited government, free markets, parental rights and private property rights. The Foundation seeks, through litigation and education, to protect the fundamental freedoms essential to the preservation of American society. The Foundation is deeply concerned about the free speech rights and free exercise of religious expression of students in the State of Texas.

STATEMENT OF THE CASE

Amici adopt by reference the statement of facts in the Petition For A Writ Of Certiorari filed by Petitioners.

ARGUMENT

This should have been an easy case. It was made hard only because this Court is long overdue to revisit its church autonomy law and to reaffirm, and thereby clarify, the manner by which the First Amendment applies to the line of cases where churches are sued in tort.

Plaintiff, Jane Kliebenstein, claims she was defamed when the Rev. Jerrold W. Swinton, a denominational official, sent a letter saying that continued inaction by the

congregants at Shell Rock Methodist Church permitted "the spirit of Satan to work in their midst," that they should "know whether a person has the spirit of Jesus or Satan by their fruits -- Matthew 7:15-20," and that they should no longer tolerate one who "tears down the body of Christ by habitually sowing discord" in their ranks.

Defendants raise truth as a defense. They also move to summarily dismiss for lack of subject matter jurisdiction,[2] and in support of the motion rely solely on the First Amendment.

To show that the statements in the Swinton letter are true, Defendants will offer evidence to a jury that Ms. Kliebenstein's conduct was tearing down the body of Christ[3] by creating division within the church and that such conduct is not in accord with the spirit of Jesus but with the spirit of Satan. The letter itself says how the congregants are to go about distinguishing between the two spirits, namely, that Ms. Kliebenstein shall be known by her fruits as measured by Matthew 7:15-20.[4]

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[2] Because the doctrine of church autonomy connotes a limit on civil power, a court dismissing claims that intrude into a church's autonomy will often do so by dismissing for lack of subject matter jurisdiction. *See, e.g., Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872). The nonjusticiable nature of such a claim when filed in federal court is, of course, not based on Article III of the Constitution but is attributable to the First Amendment.

[3] The "body of Christ" is a metaphor for the church. *See* The New Testament, Book of First Corinthians 12:27.

[4] The New Testament, Gospel of Matthew 7:15-20, issues a warning about false prophets who can be "recognized by their fruits."

To ask a civil court to pass on the truth or falsity of the assertions about Ms. Kliebenstein is to ask a quintessential religious question. In *United States v. Ballard*, 322 U.S. 78 (1944), this Court held that the truth or falsity of a religious claim can never be submitted to the scrutiny of a jury. *Ballard* was a prosecution for mail fraud involving claims to perform miraculous healing in return for money. In the course of reviewing jury instructions and convictions thereon, this Court said:

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. . . . The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

Id. at 86-87. The *Ballard* holding, directly applicable here, is not an isolated principle of law. Rather, in a variety of contexts this Court has held that civil courts must avoid fashioning legal rules that cause them to probe into the religious meaning of church-related words, practices, and events.[5]

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[5] *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality) (stating that for authorities to troll through a religious institution's beliefs in

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Unlike voluntary organizations generally, religious bodies are acknowledged to have a level of autonomy from government intrusions that would otherwise invade subject matters within the province of the church.[6] This is a logical implication of the separation of church and state.[7]

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order to identify if it is "pervasively sectarian" is offensive and contrary to precedent); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 843-44 (1995) (rejecting argument that university should distinguish between evangelism, on the one hand, and the expression of religious view on secular subjects, on the other); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (recognizing a problem should government attempt to divine which jobs are sufficiently related to the core of a religious organization so as to merit exemption from statutory duties); *id.* at 344-45 (Brennan, J., concurring) (same); *Widmar v. Vincent*, 454 U.S. 263, 269-70 n.6, 272 n.11 (1981) (holding that inquires into religious significance of words or events are to be avoided); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (holding that it is desirable to avoid entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs); *see also Rusk v. Espinosa*, 456 U.S. 951 (1982) (mem.) (striking down charitable solicitation ordinance that required officials to distinguish between "spiritual" and secular purposes underlying solicitation by religious organizations).

[6] The rationales for the rule are: (i) civil officials are unschooled in theology and thereby are not competent to resolve disputes concerning religious doctrine, nor to properly interpret religious documents and canon law; (ii) for law to side with one faction of a religious dispute risks "establishing" the prevailing faction and inhibits change or reform in doctrine; (iii) both clerics and lay members of a religious group have voluntarily joined the organization, thereby giving implied consent to the internal church resolution of disputes; and (iv) autonomy allows for churches to continue their historically pivotal role as a mediating institution guarding against state absolutism.

[7] *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 730 (1872) ("The structure of our government has, for the preservation of civil liberty rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.").

Application of this principle can usefully be divided into four topical areas where civil courts are without jurisdiction: (1) questions of doctrine, changes in doctrine, and the resolution of doctrinal disputes;[8] (2) choices about ecclesiastical polity and its administration, including matters concerning the interpretation of an organization's organic documents and bylaws;[9] (3) the selection, credentialing, promotion, and discipline of clerics and other ecclesiastics;[10] and (4) the admission, discipline, and excommunication of church members.[11]

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[8] *Maryland & Va. Churches of God v. Church at Sharpsburg*, 396 U.S. 367, 368 (1970) (per curiam) (avoid doctrinal disputes); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Church*, 393 U.S. 440, 449-51 (1969) (rejecting rule of law that discourages changes in doctrine); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 725-33 (1872) (rejecting implied-trust rule because of its departure-from-doctrine inquiry).

[9] *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-24 (1976) (civil courts may not probe into church polity); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Church*, 393 U.S. 440, 451 (1969) (civil courts forbidden to interpret and weigh church doctrine); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (per curiam) (First Amendment prevents judiciary, as well as legislature, from interfering in ecclesiastical governance of Russian Orthodox Church); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952) (same); *Shepard v. Barkley*, 247 U.S. 1, 2 (1918) (aff'd mem.) (courts will not interfere with the merger of two Presbyterian denominations).

[10] *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-20 (1976) (civil courts may not probe into defrocking of cleric); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (courts not to probe into clerical appointments); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929) (declining to intervene on behalf of petitioner who sought order directed to archbishop to appoint petitioner to ecclesiastical office).

[11] *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139-40 (1872) ("This is not a question of membership of the church, nor of the rights of

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The same principle of refusing to adjudicate has been followed by this Court when refining its analysis under the Free Exercise Clause. Hence, a civil court may not distinguish "central" religious beliefs or practices from all others, protecting only the former.[12] Likewise, a claimant may disagree with co-religionists, or be unsure or wavering,[13] without losing free-exercise protection. These questions are nonjusticiable, for the civil courts "are not arbiters of scriptural interpretation." *Thomas v. Review Board*, 450 U.S. 707, 716 (1981).

The state supreme court here acknowledges that a question of fact for trial is the truth or falsity of whether Ms. Kliebenstein's behavior was that of the "spirit of Satan." Obviously this is a religious question. In order to

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members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership. . . . [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off."); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872) (finding no court jurisdiction as to church discipline or the conformity of members to the standard of morals required of them); *see Order of St. Benedict v. Steinhauser*, 234 U.S. 640, 647-51 (1914) (so long as individual voluntarily joined a religious group and is free to leave at any time, religious liberty is not violated and members are bound to the rules consensually entered into such as vow of poverty and communal ownership of property).

[12] *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (rejecting free-exercise test that "depend[s] on measuring the effects of a governmental action on a religious objector's spiritual development"); *United States v. Lee*, 455 U.S. 252, 257 (1982) (rejecting government's argument that free-exercise claim does not lie unless "payment of social security taxes will . . . threaten the integrity of the Amish religious belief or observance").

[13] *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981).

skirt that conclusion, and after consulting three general-use dictionaries, the state court found that "spirit" and "Satan" can have secular as well as religious meanings.[14] The implication is that at trial Defendants are to offer evidence on the truth of the statements based on their secular meaning.

This makes no sense. The Defendants cannot with sincerity defend the truth of the Swinton letter except in the context in which it was written, namely, its religious meaning. Anything else will be a sham. Accordingly, on remand the Defendants are put to an impossible choice. They either face the task of proving something never intended, namely the secular meaning of "spirit of Satan" as a truthful characterization of Ms. Kliebenstein, or proving the religious meaning of "spirit of Satan" as a truthful characterization of Ms. Kliebenstein. The first is disingenuous, the second entails the loss of a longstanding First Amendment restraint on civil courts sitting in judgment over religious disputes.

The Iowa Supreme Court acts as if the purpose of the church autonomy doctrine is to protect civil courts from having to decide religious questions. That gets the First Amendment exactly backwards. The purpose of the doctrine is to protect churches from the civil courts. When made aware of the doctrine of church autonomy, the state court here sought to avoid it by devising an "escape hatch," namely it found or invented some secular fragment in the

[14] There apparently was no attempt to determine a dictionary definition of the phrase "spirit of Satan." The state supreme court looked up definitions of "devil," "satanic," and "satanism," albeit these words were not used in the Swinton letter.

case and then assumed that focusing on this secular fragment would avoid the religious question and would not trample on religious exercise. The lower court's evasion is not even a sensible one; it ordered trial on the truth of the Swinton letter based on a hypothetical secular interpretation completely different from the intended religious interpretation.

It has been 59 years since the decision in *Ballard*, and over twenty-five years since this Court's last decision where a lower civil court directly intervened into a church disciplinary proceeding. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (holding that civil courts cannot adjudicate claims that a church judicatory failed to follow its own procedures while disciplining a cleric, or whether such procedures comport with American notions of due process and fairness); *see also Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929) (refusing to adjudicate claim that archbishop had wrongfully breached agreement to appoint plaintiff to an ecclesiastical office).

A distressing number of state supreme courts are at a loss when it comes to understanding and applying the law of church autonomy to torts. *See* Defendants' Petition for a Writ of Certiorari pages 14-18 (collecting cases). The Iowa Supreme Court decision here is both illustrative and all too common. By way of contrast, the lower federal courts seem to generally understand and properly apply the doctrine. *See, e.g., University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002) (holding that NLRB does not have jurisdiction over religious college and that board may not fashion a "substantial religious character" test to determine whether the college is or is not sufficiently religious to be protected by First Amendment church autonomy doctrine); *EEOC v. Roman Catholic Diocese of*

Raleigh, N.C., 213 F.3d 795, 800-02 (4th Cir. 2000) (dismissing for First Amendment reasons a Title VII sex discrimination claim by minister of music for failure of church to appoint her as an elder and for her removal from ministerial status). One could speculate as to why so many state high courts are "totally at sea" when it comes to church autonomy and claims in tort: given the nature of their docket, they are unfamiliar with First Amendment law generally; or church autonomy law is rarely taught in law schools and thus not well understood; or it has been so long since this Court has taken up a church autonomy case that the state courts are unsure of the status of the principle. Whatever the reason for the disarray, the present lack of uniformity and disregard of church autonomy law cries out for this Court's attention.

CONCLUSION

Rulings like the one here by the Iowa Supreme Court are proliferating at an alarming rate. This Court's plenary review is sorely needed to instruct state courts in the first principles of church autonomy law and to reign in those state courts, not few in number, that are proceeding in disregard of the First Amendment's provision for the freedom of self-governance of ecclesiastical bodies.

A number of churches, most notoriously the Catholic Archdiocese of Boston, have recently come in for severe criticism for inaction in the face of misdeeds by lower-level clerics and other officers. In the case here we have a denominational official in Iowa starting to take the necessary action where there has been misbehavior by a lay

officer and member. Instead of being praised, the Defendants get hit with a tort claim. It cannot be the law that a church's beginning steps to do the right thing so as to protect other people and itself from harm ends up getting punished. Such a result is neither in the long-term interest of society, which needs public order, nor in the interest of religious freedom.

Amici urge this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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